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No. 85-2105

In the Supreme Court of the United States

OCTOBER TERM, 1986

DEBORAH DELAPLANE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that foreign wiretap evidence should be suppressed if the foreign officers who obtained the evidence did not comply with the requirements of the federal wiretap statute.

In an indictment returned in the United States District Court for the District of Colorado, the three petitioners were charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner Delaplane was also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). All three petitioners entered conditional pleas of guilty, reserving the right to appeal the validity of electronic surveillance that had been conducted by Canadian authorities in Canada. Petitioner Delaplane was sentenced to concurrent terms of five years' imprisonment, and petitioners O'Brien and Mosher were sentenced to four years' imprisonment. Delaplane was also

sentenced to a special parole term of five years on the possession count. The court of appeals affirmed (Pet. App. 1-14; 778 F.2d 570 (1985)).

1. The evidence presented during the motion hearings is summarized in the opinion of the court below. It showed that from November 1981 through March 1983, Corporal Neal A.J. Kingdon, of the Royal Canadian Mounted Police, was investigating the suspected drug activities of petitioner O'Brien, a resident of Red Deer, Alberta. At several points during the investigation, Kingdon requested routine intelligence information from a United States Customs Service agent in the State of Washington. Pet. App. 2-3.

During his investigation, Kingdon learned from an unidentified informant that O'Brien was soon to be involved in a major drug transaction. Kingdon obtained a court order from the Queen's Bench court of Alberta to wiretap O'Brien's telephone at his residence in Red Deer. Pet. App. 3. The next day Kingdon learned from an intercepted conversation that O'Brien was going to meet a woman named "Deb" in Great Falls, Montana. The conversation revealed that O'Brien was to give "Deb" money to take to San Francisco, after which the two would meet with petitioner Mosher in Denver, where O'Brien would receive drugs. After the interception, Kingdon called the Customs agent from whom he had previously obtained intelligence information. That agent in turn contacted other agents in Great Falls and Denver to establish surveillance of the suspects. *Ibid.*

On March 25, shortly after petitioner Delaplane's incoming flight arrived, petitioners were arrested at the Denver airport. Delaplane was searched incident to her arrest, and the officers seized two packages of cocaine from her. Pet. App. 3.

Following their indictment, petitioners challenged the evidence that was obtained as a result of the Canadian wiretap. The district court denied the suppression motion, finding that neither the federal wiretap statute, 18 U.S.C. 2510 *et seq.*, nor the Fourth Amendment exclusionary rule required that the fruits of the Canadian wiretap be excluded. Pet. App. 6-8. The district court found that the wiretap was conducted as part of an investigation of a Canadian offense, and was not the product of a joint investigation by Canadian and American authorities. Pet. App. 7. The district court further concluded that the circumstances under which the court-authorized Canadian wiretap was conducted did not "shock the senses of the Court" and therefore did not require suppression on due process grounds. *Id.* at 7-8. Although noting that Canadian wiretap law is less restrictive than its American counterpart, the district court concluded that the Canadian authorities had followed Canadian law to obtain the wiretap evidence. The court therefore held that there was no reason to suppress that evidence when it was offered in an American court. Pet. App. 8. The court of appeals upheld the district court's findings and agreed with its conclusion that the Canadian wiretap evidence and its fruits need not be suppressed simply because the evidence was not obtained in a manner that would have satisfied the American wiretap statute. Pet. App. 8.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

Petitioners' sole contention (Pet. 6-8) is that the federal electronic surveillance statute, 18 U.S.C. 2510 *et seq.*, governs the admissibility of all wiretap evidence in trials in the United States and therefore required the suppression of the Canadian evidence. That contention lacks merit.

The federal wiretap statute regulates only domestic interceptions. Evidence seized by foreign officials in the course of foreign wiretaps is therefore admissible in United States courts, even if that evidence was obtained without satisfying the standards set forth in the federal statute. See *Stowe* v. *Devoy*, 588 F.2d 336, 340-342 (2d Cir. 1978), cert. denied, 442 U.S. 931 (1979); *United States* v. *Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Toscanino*, 500 F.2d 267, 279 (2d Cir. 1974); *United States* v. *Bennett*, 538 F. Supp. 1045, 1048 (D. P.R. 1982); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 157 n.6 (D.D.C. 1976).

Petitioners take the extreme position that any wiretap evidence obtained anywhere in the world must be suppressed if it does not conform with all the requirements of the federal statute. If accepted, that argument would have the effect of excluding all foreign wiretap evidence, because the federal statute limits the power to apply for an interception order to the Attorney General, his principal assistants, and the principal prosecuting attorneys of the 50 states, Puerto Rico, the District of Columbia, and the United States territories and possessions. 18 U.S.C. 2510(3), 2516. The far more reasonable interpretation of the statute is that it does not apply to conduct outside the United States. That interpretation is consistent with the established canon of statutory construction that federal statutes apply only within the United States unless a contrary intent appears. *Foley Bros.* v. *Filardo*, 336 U.S. 281, 286 (1949); *United States* v. *Cotroni*, 527 F.2d at 711. In the case of the federal wiretap statute, the legislative history firmly supports the view that the statute applies only to interceptions within the United States: the Senate report on the wiretap statute explained that the term "wire communication," which defines the reach of the statute with regard to wiretaps, means communications carried by a common carrier

"through *our Nation's* communications network." S. Rep. 1097, 90th Cong., 2d Sess. 89 (1968) (emphasis added).

Moreover, there is no basis for employing the sanction of exclusion to evidence seized by foreign officials in a foreign country. The scope of the statutory suppression remedy is governed by its exclusionary rule provision (18 U.S.C. 2518(10)). See *United States* v. *Giordano*, 416 U.S. 505, 524 (1974). The legislative history of the statute shows that there was no intention to expand the scope of the statutory exclusionary rule beyond existing law (*id.* at 528). Under existing law, the constitutional exclusionary rule does not require the suppression of evidence seized by foreign police. *United States* v. *Janis*, 428 U.S. 433, 455-456 n.31 (1976); *United States* v. *Mount*, 757 F.2d 1315, 1317 (D.C. Cir. 1985); *United States* v. *Hensel*, 699 F.2d 18 (1st Cir.), cert. denied, 461 U.S. 958 (1983); *Stowe* v. *Devoy*, 588 F.2d at 341; *United States* v. *Morrow*, 537 F.2d 120, 139 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977); *Stonehill* v. *United States*, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969). Accordingly, there is no statutory basis for excluding evidence of the sort at issue in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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